STATE OF MICHIGAN

IN THE SUPREME COURT

APPEALED FROM THE GENESEE COUNTY CIRCUIT COURT

THE HONORABLE JUDITH A. FULLERTON

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff/Appellee,

v

CLARENCE D. MOORE,

Defendant/Appellant.
_____/ DOCKET NO.120543

ARTHUR A. BUSCH (P-33872)
DONALD A. KUEBLER (P-16282)
Attorney for Plaintiff/Appellee
Genesee County Prosecutor
100 Courthouse
Flint, MI 48502
(810) 257-3210

ROBERT L. SEGAR (P-20193)
Attorney for Defendant/Appellant
2540 Nolen Drive
Flint, MI 48504
(810) 341-6520

_____/

BRIEF ON APPEAL-APPELLANT
ORAL ARGUMENT REQUESTED

Robert L. Segar
Attorney for Appellant
2540 Nolen Drive
Flint, MI 48504

DATED: December 20, 2002

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Statutes

STATEMENT OF THE BASIS OF JURISDICTION OF THE COURT OF APPEALS

Jurisdiction was conferred on the Court of Appeals by Michigan Court Rule 7.203(A). The judgment of sentence sought to be reviewed was entered on July 27, 1998 and the Order Denying Defendant's Motion for New Trial and/or Judgment of Acquittal was entered August 13, 1998.

The Motion for New Trial and/or Judgment of Acquittal was filed on July 10, 1998. The order denying it was entered August 13, 1998.

The Claim of Appeal was filed on September 10, 1998.

STATEMENT OF QUESTIONS INVOLVED

I. WAS THERE SUFFICIENT EVIDENCE TO CONVICT APPELLANT OF VIOLATING MCL 750.277b ("FELONY-FIREARM")?

THE TRIAL COURT SAID "YES."

APPELLANT SAYS "NO."

II. SHOULD THIS COURT OVERRULE OR MODIFY THE DECISION IN PEOPLE v JOHNSON 411 MICH 50 (1981)?

THE TRIAL COURT DID NOT ANSWER THIS QUESTION

APPELLANT SAYS "NO."

STATEMENT OF FACTS

Defendant and Appellant, Clarence Moore, appealed of right his jury based convictions in Genesee County of first degree murder (MCL 750.316), assault with intent to commit murder(MCL 750.83), and felony-firearm possession. MCL 750.227b These convictions were founded solely on his alleged aiding and abetting of Dujuan Boylston--the party known to have shot and killed Jackie Hamilton and to have assaulted his brother, Johnny Hamilton. After the Court of Appeals rejected his claims of error,[1] Appellant sought leave to appeal. Leave was granted limited to (1) the sufficiency of the evidence to convict him of violating MCL 750.227(b) ("felony-firearm") and (2) whether the decision in People v Johnson, 411 Mich 50 (1981) should be overruled or modified.[2] This case was consolidated with People v Harrison, unpublished opinion no 222468, dated November 20, 2001.

On the evening of August 8, 1997, brothers Jackie and Johnny Hamilton were fishing on the dock at a lake in Flint, Michigan (83a).[3] While they were on the dock, Johnny Hamilton testified that he saw two trucks pull up at the top of a hill which led down to the water . He further stated that two people started coming down the hill (84a-86a) although he had originally told Flint Police Officer Charles Middleton shortly after the incident that three people had done

---

[1]People v Moore, Unpublished Opinion 214248, dated November 20, 2001 (29a).

[2]Appellant's Motion for Reconsideration of the denial of leave with respect to the sufficiency of the evidence to convict him of first degree murder is pending at this time.

[3]Events leading up to this point are not material to the issues involved as they did not include any evidence connecting Appellant to the gun in question.

so (195a). He stated that the shorter person[4] had a rifle (86a-87a). The taller person was about 5 to 7 yards to the right hand side of the one with the gun (86a-88a). Hamilton also testified that, as they approached within about 20 to 25 yards, the people coming down the hill started talking (88a). The taller person was doing most of the talking, and Johnny Hamilton interpreted it as meaning he was going to start trouble (89a-90-a).

He recognized the shorter person who had the rifle as someone he had played basketball with and reminded him that they knew each other (91a -92a). Hamilton testified that he heard the taller one telling the shorter person (i.e., Juan Boylston) holding the rifle to shoot them, but the latter said that he recognized Hamilton, the two brothers were fishing and not bothering anybody, and that he was not going to do it (92a).

At one point, according to Hamilton, the taller person asked for the gun and tried to take it from the shorter person but was unsuccessful (92a-93a). The taller person then started walking up the hill leaving the shorter one behind who was walking behind him very slowly (93a). Ultimately, as he was walking up the hill, the person with the rifle who was known to Jackie Hamilton, turned around, aimed the gun for a few seconds and then fired a number of shots (94a). Johnny Hamilton was not hit, but his brother Jackie was and ultimately died from the gunshot wound (94a-95a; 101a). Both of the brothers went into the water and then after getting out, Johnny Hamilton went to get help and managed to get his brother to the hospital (96a-97a).

The only witness who saw the rifle used by Boylston was Johnny Hamilton. He testified that it was always in Boylston's possession and that , although the other person attempted to get

---

[4]Later identified as Juan Boylston and convicted by a different jury of second degree murder, felonious assault and felony-firearm.

it from him, he did not succeed.(92a-93a, 103a, 108a, 115a). Witness Dorian Grady testified that he had never seen a rifle in the truck driven by Appellant (49a). He stated further that he had never seen a case or box of .22 long rifle bullets there.[5] Police officer Robert Smith also stated that he had never seen Appellant with a 22 rifle(58a). No one testified that Appellant owned a gun or that he had ever previously been seen with one.

At the close of the People's case, Appellant made a motion for a directed verdict. The motion was denied (11a). No further proofs were submitted and the jury's findings of guilty followed.

Appellant was sentenced to a term of two years for his conviction of felony-firearm and given credit for 164 days. On the charge of first degree murder, Appellant was sentenced to life, and for the offense of assault to commit murder, he was sentenced to a minimum of 15 and a maximum of 30 years. The sentences for murder and assault run concurrently, but were consecutive as to the felony-firearm count (27a-28a)

Defendant filed a motion for new trial and/or judgment of acquittal on July 10, 1998 alleging a number of serious errors (15a-19a). The motion was denied (26a). Defendant appealed and the Court of Appeals in an unpublished per curium opinion dated November 20, 2001, affirmed his convictions (29a-41a). This Court then granted leave to appeal limited to the issues noted, supra. Appellant's motion for reconsideration is pending at this time.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTIONS FOR DIRECTED VERDICT AND FOR ACQUITTAL ON THE CHARGE

[5]Sliding top part of a carton of Mini-Mag 22 long caliber shell was found in the truck investigated in connection with the shooting (67a-72a; 75a-78a).

OF FELONY-FIREARM RESULTING IN A CONSTITUTIONALLY DEFICIENT CONVICTION

The standard of review for this issue requires that the reviewing court "consider not whether there was any evidence to support the conviction but whether there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt." (People v Wolfe, 440 Mich 508, 513; amended 441 Mich 1201 (1992); People v Hampton, 407 Mich 354 (1979); Jackson v Virginia, 443 U S 307, 99 S Ct, 2781, 61 L Ed2d 560 (1979); In re: Winship, 397 US 358 90 S Ct 1068 25 LEd2d 1970)). Factual conflicts are to be viewed in a light most favorable to the prosecution (People v Wolfe, supra). This requirement of sufficient evidence is a part of every criminal Defendant's due process rights as required by the State and Federal Constitution Id., p 514).

Appellant was convicted of felony-firearm because the jury was allowed to find that he aided and abetted Dujuan Boylston, the person who shot and killed Jackie Hamilton. Although, the Court of Appeals concluded that there was "sufficient evidence" that he "aided and abetted[6] Boylston's possession of the firearm" to convict him of that charge, it did not identify any of that evidence.

However, there is no evidence in this case that Appellant had anything to do with Boylston's obtaining possession of a firearm. The rifle used was never recovered. The only testimony with respect to its possible connection to Appellant was given by witnesses Robert Smith and Dorian Grady. The former witness said he had never seen a rifle or a box of .22 long

---

[6]As the identity of the shooter (i.e., principal) was known, the case against Appellant was solely based on his alleged aiding and abetting.

rifle bullets in Appellant's truck (58a). The latter stated that he had never seen Appellant with a rifle (49a). The only other testimony relevant to the gun was that of Johnny Hamilton who said that, at one point, the "taller person" tried to deprive Boylston of possession of the gun but was unsuccessful:

> "A. . . . and he tried to take the gun from the shorter guy, like wrestling for it, but the shorter guy never did let him take it." (93a)
>
> * * *
>
> "A. no, it wasn't--it wasn't a big struggle, he just–he just like tried to grab it and the other guy just snatched it back, tried to reach for it again, and the other guy liked turnt [sic] all around...," (103a)
>
> * * *
>
> "Q. Who had the rifle, the person by the tree or--
>
> A. The first–the–the guy by the tree had the rifle, I think he was loadin' it or cockin' it or whatever, and this guy that had the rifle, that's the guy that kept the rifle the whole time.
>
> Q. Ok, so the rifle never changed hands?
>
> A. Never.
>
> Q. Alright, and that person that was by the tree had the rifle right from the beginning?
>
> A. Yes." (108a)

Thus, there was no testimony that at the time of the incident, or at any earlier time, Appellant had control or possession of the gun or the ability to obtain possession. Indeed, the only proof related to an attempt to deprive the shooter of possession. Therefore the evidence was legally insufficient to allow a jury to find beyond a reasonable doubt that Appellant met the test required in People v Johnson, 411 Mich 50, 54 (1981):

> "To convict one of aiding and abetting the commission of a separately charged crime of carrying or having a firearm in one's possession during the commission of a felony, it must be established that the Defendant procured, counseled, aided, or abetted and so assisted in obtaining the proscribed possession, or in retaining such possession otherwise obtained. . . ." (Citations omitted; Id., p 54; emphasis added).

In People v Bruno, 115 Mich App 656 (1982), the trial court found as follows:

> "The defendant was aware of the fact that the firearms would be used in connection with the commission of the crime, that he intended those firearms to be used, that he actively participated and assisted in the crime involving their use and that he was guilty, therefore violating the provisions of the felony-firearm Statute." (Id., 660)

In reversing the Defendant's conviction of felony-firearm, the Court of Appeals stated:

> "Under Johnson, in order to convict defendant of Felony-firearm, defendant must have assisted in obtaining or retaining possession of the firearm. That he was aware that a firearm would be used, intended that it be used, and actively participated in the crime involving its use is not sufficient. The facts presented here would not justify a rationale trier of fact in recently concluding that defendant assisted in obtaining or retaining possession of the firearms." (Id., 661(a))

Acquiescence in another person's retention of a firearm is not sufficient to come within the rule stated in People v Johnson, supra. People v Morneweck, 115 Mich App 156 (1982)

The United States Supreme Court stated In re: Winship, supra:

> "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

The evidence in this case demonstrated without question that the firearm involved was always in the possession, and within control, of the shooter. There was no evidence that Defendant, in any way, assisted him in obtaining or retaining that possession. Based on the above clear legal precedent, the Court should have granted Defendant's Motion for Acquittal (Tr.

pp 736-739) of the felony-firearm charge.

II. THIS COURT SHOULD NOT OVERRULE OR MODIFY PEOPLE V JOHNSON, 411 MI 50(1981)

This Court has questioned whether it should overrule its decision in People v Johnson, 411 Mich 50 (1981). An issue of statutory interpretation is a question of law subject to de novo review (People v Philabaun, 461 Mich 255 (1999); People v Law, 459 Mich 419 (1999)).

In People v Johnson, 85 Mich App 654(1978), the Court of Appeals held:

> "We interpret the felony-firearm statute to require that a defendant Personally carry or have in his possession a firearm in order to be guilty thereunder. Being an aider and abetter in an armed robbery is not enough to subject a Defendant to the enhanced sentence of the felony-firearm statute.(Id, 658)

In the ensuing appeal, this Court rejected the notion that personal possession was required and, instead, established the rule that:

> "To convict one of aiding and abetting the commission of a separately charged crime of carrying or having a firearm in one's possession during the commission of a felony, it must be established that the defendant procured, counselled, aided, or abetted and so assisted in obtaining or in retaining such otherwise obtained possession." (citations omitted) (People v Johnson, 411 Mich 50 (1981)

In short, it held that a person can be convicted as an aider and abetter without having actual personal possession of a firearm as long he contributes specifically to the principal's obtaining or retaining possession.

It reasoned that, because possession of the firearm is a distinct crime from the underlying felony, an aiding and abetting charge "must be established in each to support conviction of each"(Id, p54). The opinion was unanimous. The decisions of this Court have consistently held

that the legislature intended to create a separate and additional offense .(Wayne County Prosecutor v. Recorder's Court Judge, 406 Mich 374(1979); People v. Mitchell, 456 Mich 693(1998))

The felony-firearm Statute provides in relevant part:

> "A person who carries or has in his...possession a firearm when he...commits...a felony...is guilty of a felony..."750.227(b)

The gravamen of the offense is not the use of the weapon but rather the possession or carrying of it while engaging in other criminal conduct. An obvious principal purpose was to deter people intending to violate the law from making guns part of their plans.

The aiding and abetting statute provides in relevant part:

> "Every person concerned in the commission of a defense, whether he directly commits the act constituting the offense or procures, counsels, aids or abets in its commission may hereafter be prosecuted...and on conviction shall be punished as if he had directly committed such offense." (MCL 767.39; emphasis added)

In felony-firearm cases, the core "act constituting the offense" is the possession or carrying of a gun while committing an underlying felony.

The aiding and abetting statute is very broad, and contains no exceptions. It has been held to apply to other possession offenses (People v Doemer, Jr., 35 Mich App 141 (1971). The legislature did not exempt the felony-firearm offense from operation of the aiding and abetting statute.

The courts have recognized that the legislature, in enacting the felony-firearm provision, intended to prevent injury to others during the commission of a criminal offense.

> "By punishing the 'possession', as opposed to the 'use' of a firearm during the commission of a felony, the Legislature was attempting to reduce the possibility

> of injury to victims, passer by and police officers. Had Defendant's criminal enterprise gone awry, he may well have been tempted to use his firearm to effect an escape. The mere fact that a felon has a firearm at his disposal, should he need, it creates sufficient enough risk to others that it is within the state's power to punish its possession. Moreover, the statute as written may act toward the felony itself." (People v Williams, 212 Mich App 607 (1995)

The statute's purpose of deterrence will be best served by penalizing persons as aiders and abetters who help cause a gun to be available.

The felony-firearm statute has been amended during the course of its existence subsequent to the decision in People v Johnson, supra. In 1990 it added to the list of excepted felonies. It did not choose to change the result required by the Johnson ruling of which it surely was aware. See People v Mitchell, 456 Mich 693 (1998). When the legislature amends a statute without significantly changing language which has been interpreted by the judiciary, it is presumed to have acquiesced in the interpretation (Hasty v Boroughton, 133 Mich App 107 (1984). This Court, as is its purpose, has properly discerned and given effect to the legislature's intent (People v Morey, 461 Mich 325 (1999)

It is in accord with logic and common sense that, as this Court said in People v Johnson, supra, any conviction for aiding and abetting should be connected to the principal element of the offense being aided and abetted. People v Johnson, supra, has been the law of this state for more than 20 years. Its unanimous holding has been applied in many cases. Appellant's counsel has seen no instance where any appellate court has questioned its soundness.

CONCLUSION

In summary, there is insufficient evidence to allow conviction of Appellant under the test set forth in People v Johnson of the felony-firearm violation. It is, therefore, constitutionally deficient.

Further, this Court correctly interpreted that statute by requiring that an aider and abetter have some connection with the possession or retention of the firearm before he can be convicted under it.

RELIEF REQUESTED

Appellant requests that this Court reverse his conviction on the charge of felony-firearm, and direct that he should be acquitted on said charge.

Robert L. Segar
Attorney for Appellant

DATED: December 20, 2002